**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Federal-State Joint Board on | ) | CC Docket No. 96-45 |
| Universal Service: | ) | |
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| ACS of Fairbanks, Inc. | ) | DA 02-1853 |
| Petition for Declaratory Ruling | ) | |
| and Other Relief | ) | |

**Comments of the**
**Regulatory Commission of Alaska**

Date: August 30, 2002

/S/
Will Abbott, Commissioner
Regulatory Commission of Alaska

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The Regulatory Commission of Alaska (RCA) welcomes the opportunity to respond to the Public Notice (DA 02-1853) seeking comment on the ACS of Fairbanks, Inc. (ACS-F) petition for declaratory ruling and other relief.

## Summary

In its petition ACS-F requested that the Federal Communications Commission (Commission) deny universal service support to its competitor, a competitive eligible telecommunications carrier (CETC). ACS-F also asserts that the Commission's policies implementing the competitive market policies of the Telecommunications Act in areas eligible for high-cost universal service support are flawed. We oppose the petition and suggest that if there are flaws in the method used to pay federal universal service support to CETCs, those issues are best addressed through the Federal-State Joint Board process. The Commission should not implement the sweeping change urged by ACS-F without allowing all affected carriers nationwide to comment and allowing the Joint Board to consider the impact of these recommendations on the universal service fund. Universal service funding is designed to insure service to customers, not companies. ACS-F's

proposed remedy potentially harms customers across the nation by limiting their service options to further the company goal of protecting its share in a competitive market.

**Comments**

**1. The RCA has complied with all relevant federal law. The RCA found no evidence that 2002 universal service funds would be improperly used.**

Throughout its petition, ACS-F implies that there is misuse of federal universal service funds in Alaska and that we abdicated our responsibility to ensure the appropriate use of funds. ACS-F argues that we failed to meet our obligations as we did not "tie GCI's[1] certification as a CETC to any demonstration that its costs of providing service justify receipt of universal service funding."[2] ACS-F claims that we must evaluate GCI's use of funding based primarily on an analysis of unbundled network element (UNE) rates. ACS-F however has failed to demonstrate that any federal law or requirement directs that we must conduct our certification process in the limited manner it proposes.

All local carrier study areas in Alaska, except for Anchorage, are rural under 47 U.S.C. 153(37) and as such fall under 47 C.F.R. § 54.314 of the Commission's rules governing eligible telecommunications carrier (ETC) certification. Those rules do not require that we conduct our certification analysis using the limited UNE review proposed by ACS-F. The federal regulations provide no guidelines or limitations on how we are to conduct our review. The federal regulations appropriately allow states the flexibility to conduct UNE reviews in the manner appropriate to their local markets. We used our best

[1]GCI Communication Corp., d/b/a General Communication, Inc., d/b/a GCI. GCI is currently the only CETC authorized in Alaska.

[2]ACS-F Petition at 18.

judgement to assess future use of 2002 funds by all Alaskan ETCs and timely filed the required certifications.[3]

We fulfilled our responsibility to insure that Alaskan eligible telecommunications carriers would appropriately use 2002 universal service. On July 13, 2001, we opened Docket U-01-90 to develop a record that became the basis for our 47 C.F.R. § 54.314 certification. We required each regulated ETC in Alaska, including GCI, to certify that funds obtained in 2002 would only be used to provide, maintain, and upgrade facilities and services for which the support was intended.[4] This part of our review mirrors the federal review process that applies to non-regulated carriers.[5]

We also required each carrier to provide us with financial data. We reviewed the data to verify appropriate use of universal service support and insure that the receiving companies were earning no more than their authorized rates of return. Some of the financial information we requested could not apply to GCI because GCI is treated as a non-dominant carrier in our local markets.[6]

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[3]The RCA filed its certification letter on September 26, 2001.

[4]47 U.S.C. 254(e). Order U-01-90(1), dated July 13, 2001, and letter to GCI dated September 7, 2001, in Docket U-01-90.

[5]For carriers not subject to state regulation, the Commission only requires the carrier to submit an "annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. §54.314(b). For these unregulated carriers, no cost analysis is required.

[6]We previously determined it would be inappropriate to apply to non-dominant carriers such as GCI a requirement to follow our Uniform System of Accounts or to conduct Jurisdictional Separations studies. As a result it is not possible for GCI to report historical data on a jurisdictionally separated basis to develop a local revenue requirement and local rate of return similar to the incumbent.

We believe that GCI's lack of jurisdictionally separated financial data was not sufficient reason to deny the carrier the ability to obtain federal funding.[7] GCI committed to use 2002 funds in an appropriate manner and we had no evidence to suggest it would do otherwise. We also noted that GCI's local rates in competitive areas remained comparable to or lower than the incumbents' rates, further suggesting 2002 funds would be used appropriately to reduce rates rather than increase shareholder returns.

Our decision concerning GCI was questioned by a coalition of incumbents in Docket U-01-90, suggesting that because GCI planned to use cable facilities to provide local service we should develop a new process for certifying annually that GCI is using funds only for the provision, maintenance, and upgrade of facilities and services for which the support was intended. We denied the request, concluding as follows:

> For competitive service offered in a high cost area, the Federal Communications Commission (FCC) chose to allow the competitive provider to receive the same subsidy that the ILEC receives to achieve the theoretical level playing field. The FCC assumed that the ILEC accurately reported their costs to receive high cost funding, and that a CLEC operating in the same area would face the same costs. If the CLEC chose to purchase the use of loops from the ILEC, the subsidy would be no more than the CLEC paid for the loop. As the Rural Coalition aptly noted, this system creates an economic incentive for competitors to construct facilities to offer service when they can do so at less cost than the ILEC. The Telecommunications Act (the Act) was designed to encourage the development of modern telecommunications infrastructure throughout the country. The FCC's regulation potentially rewards competitors willing to invest in new infrastructure.
>
> We directed GCI not to allow USF to inappropriately benefit the television and advanced services provided by its cable affiliate. GCI indicated its willingness to provide us with information we may need to verify that it is properly using USF funds. No one has presented us with evidence that GCI has or will improperly apply its USF. Without some evidence to support the Rural Coalition's expressed concern that this could be a problem, we will not order a workshop. We need not investigate a suspicion or plan

[7] *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608 (5th Cir. Jan. 25, 2000).

> for a contingency that we have adequate assurance can be avoided. Any future concerns we may have regarding GCI's use of funds can be addressed directly through our annual certification process or through a proceeding opened to address evidence of improper use of USF.[8] (*Footnotes omitted.)*

As a result of our review in Docket U-01-90 we concluded that ETCs, including GCI, would appropriately use such funds and issued our certification letter on September 26, 2001. We have not abdicated our responsibilities under the Act and it was reasonable for us to certify appropriate use of 2002 funds based on the record we developed through Docket U-01-90. The Commission should not preempt us in this area.

**2. Adequate state protections exist to promote appropriate use of federal funds.**

If we see evidence that GCI or any other regulated carrier is improperly using federal funds, we have authority to act on the matter. All regulated ETCs in Alaska, including GCI, are obligated to file proposed changes to their local exchange rates for our review.[9] We have authority to suspend the operation of any questionable rate, including rates that may unduly cross-subsidize competitive services or otherwise are not just and reasonable. Our authority includes denial of rates found contrary to the public interest and relevant law, or that appear to misuse federal universal service funds.[10]

**3. ACS-F proposes a false forward-looking standard to evaluate rural high-cost support for the Fairbanks market.**

ACS-F argues that a CLEC should be denied universal service funds if that CLEC pays less in UNE loop rates per line than the threshold employed when calculating incumbent carrier loop support. We disagree with this approach.

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[8]Order U-01-90(6) at 2-3, dated April 18, 2002.

[9]3 AAC 53.240, AS 42.05.411.

[10]3 AAC 53.240(c), AS 42.05.421, AS 42.05.381, AS 42.05.391

UNE prices are intended to be based on forward-looking economic costs and cannot be readily compared to the $23 universal service loop threshold that is based on embedded costs. ACS-F's proposed relationship between UNE pricing and embedded historical threshold for support is not evidence that funds will be improperly used. The FCC decided to base universal service support for rural companies on embedded costs because it recognized that use of a forward-looking cost model might not adequately compensate rural companies.[11]

As the Fairbanks market becomes more competitive and ACS-F becomes more efficient in response to market forces, we expect that ACS-F's embedded costs will move closer to forward-looking costs. However, it is not appropriate now to base a rural company's support on forward-looking costs. During the transition to a competitive market, embedded costs remain the appropriate standard for determining federal high-cost support for rural companies.

ACS-F cites 47 C.F.R. § 54.307(a)(2), but does not acknowledge that in circumstances where UNE prices are less than USF support the ILEC receives the difference between the UNE loop price and the supported loop cost. This regulation was designed to adjust for the difference between forward-looking cost methodology used to determine UNE prices, and the embedded-cost methodology used to determine universal service support in rural areas.

[11] *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, FCC 01-157, released May 23, 2001.

**4. Even if forward-looking costs were the appropriate standard for developing support for Fairbanks, ACS-F's analysis is unreasonable.**

ACS-F argues that GCI should not receive federal funding as its UNE payment is $19.19 per loop while the high-cost funding threshold is $23. We believe that ACS-F's analysis oversimplifies the situation faced by GCI and would be contrary to existing FCC regulations and the Act.

UNE loop price is not the only cost faced by GCI. GCI incurs administrative expenses, engineering costs, networking costs, and other components ignored in ACS-F's analysis. Nor has ACS-F fully explained how it developed its data and supporting schedules.[12] Absent such an explanation, it cannot be assumed that the schedules are necessarily valid. Even if the schedules were valid, they undermine rather than support ACS-F's position. ACS-F's tables suggest that if GCI served predominantly Zone 1 lines in the Fairbanks area, GCI would likely operate at a loss of $1.81 per line per connection even with federal funding, negating any concern that GCI would obtain a windfall.[13]

The Commission should place no weight on data provided by ACS-F to support what might have occurred if ACS-F priced UNEs on a disaggregated basis. During the arbitration process ACS-F chose not to propose disaggregated UNE rates.[14] If disaggregated rates were critical to ACS-F's success in the market, they would have proposed them in the UNE arbitration or later.

We dispute claims that ACS-F UNE prices are below costs. ACS-F UNE

[12]ACS-F relies on NECA data without explaining the difference between how NECA determines loop costs and costs eligible for universal service support. ACS-F's repeated references to $33.51/month loop costs are misleading.

[13]Disaggregation Example, Exhibit VI to ACS-F's *Petition for Declaratory Ruling and Other Relief*, filed July 24, 2002.

prices were developed through the arbitration process based on a forward-looking cost analysis.[15] ACS-F has not provided reliable evidence that our proceeding yielded incorrect rates.[16] ACS-F argues that UNE prices are invalid because they do not equate to the embedded costs developed using a rate-of-return methodology. The two methods for determining costs are not comparable and should not produce comparable results.[17] The Telecommunications Act requires that network element charges be based on the costs determined without reference to a rate-of-return or other rate-base proceeding.[18]

ACS-F's appeals of our UNE pricing orders are pending.[19] ACS-F's current petition is another attempt to use the regulatory and legal process to shield it from competitive forces and the requirements of the Telecommunications Act.

Even if it can be shown that as a result of UNE rates, GCI does not use all of its universal service funds to reduce its local retail rates, this does not mean that GCI has violated section 254(e) of the Telecommunications Act. Section 254(e) allows GCI to use

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[14] *See* Consolidated Dockets U-99-141, U-99-142, U-99-143.

[15] The arbitration process lasted six months. After briefing by the parties, the RCA decided to use the FCC model with any adjustments proposed by the parties.

[16] ACS-F, along with its affiliated entities, has asked the FCC to preempt the RCA's UNE rate proceedings. *Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act*, WC Docket No. 02-201.

[17] *Verizon Communications, Inc. v. FCC*, 535 U.S. ___, 122 S.Ct. 1646 (May 13, 2002).

[18] 47 U.S.C. § 252(d)(1)(A)(i).

[19] *ACS of Fairbanks v. GCI Communication Corp.* 3 AN-00-3725 CI. This superior court case has been stayed during federal court litigation. *ACS of Fairbanks, Inc. v. GCI Communication Corp.* Case Nos. 01-35344 and 01-35375 are pending in the 9th Circuit Court of Appeals.

federal funds to upgrade and build facilities needed to provide local exchange services.[20] ACS-F has failed to consider that funds provided to GCI may be used for purposes other than to purchase UNEs.

**5. It is not evident that ACS-F will be unduly compromised by competition under the existing system.**

We do not believe that ACS-F has demonstrated that it will be unduly harmed by competition under the existing federal support system. We note that funds paid to a competitive ETC are not included within the indexed cap on high-cost support and as such cannot lead to reduced support to the incumbent due to cap limitations.[21] Loop support is also based on the incumbent's study area average unseparated loop cost per working loop. To the extent that the incumbent may lose working loops to competition but retains high costs, its average cost may be distributed over fewer lines. This could potentially increase its average cost per loop, leading to increased high-cost support per loop. Thus, the incumbent's total high-cost support may not change as a result of competition. If the incumbent's level of support is reduced as competition leads to transferred customer lines, this is a logical and rational outcome that is fully supported by Commission policy and the Act itself. ACS-F has provided no evidence that the market it serves requires a different outcome.

[20]This is not to suggest that there are no restrictions that apply to GCI's use of federal funds for construction, only that the Act allows funds to be used for certain types of construction.

[21]For details concerning the calculation of the federal high-cost loop support system, see 47 C.F.R. § 36, Subpart F, Universal Service.

**6. ACS-F's proposal would unfairly negate GCI's status as an ETC and would be anti-competitive.**

We granted GCI ETC status[22] because it met the necessary criteria. Under section 47 U.S.C. § 214(e), GCI as an ETC "shall be eligible to receive universal service support in accordance with section 254." If granted, ACS-F's request would therefore unfairly restrict funding to GCI in violation of section 214 and be anti-competitive.

ACS-F ignores the dual purpose of the Act to both preserve universal service and to promote competition. The Commission's policy to enable both goals has withstood court challenge:

> To be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather it is also trying to encourage local competition . . . . As long as it can reasonably argue that the methodology will provide sufficient support for universal service, however, it is free under the deference we afford it under *Chevron* step-two, to adopt a methodology that serves its other goal of encouraging local competition.[23]

ACS-F has not asserted that the support it receives is insufficient. Rather it argues that the support received by its competitor is unjustified. If the Commission's portability rules require amendment, it would be more consistent with the dual goals of the Act to maintain funding to an eligible competitor at parity to the incumbent while the rules are under review.

The customers' interests and not the incumbent's interests should control the Commission's decision in this matter. We believe it is in the public interest and consistent with fair competition in the Fairbanks market to allow GCI continued access to federal funding while the Commission reviews its policies.

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[22] Order U-97-164(1), dated December 19, 1997.

[23] *Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393 at 412; *See also*, *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608 (5th Cir. Jan. 25, 2000).

Granting ACS-F's request also could potentially violate the Act's requirements that funds be both predictable and sufficient.[24] As previously stated, the UNE line data upon which ACS-F bases its argument provides an incomplete picture of CETC costs. Denying support based on an incomplete representation of eligible costs would be unfair and contrary to the goal that the fund be sufficient. It could place the CETC in the position of having inadequate federal support to meet its eligible carrier service obligations.

**7. The Commission's portability rules were not developed solely for administrative simplicity, but rather to promote the dual goals of universal service and competition.**

ACS-F incorrectly implies that the Commission developed the funding levels to CETCs so as to avoid administrative burden. The Commission's order adopting the current policies explained that the primary motivation for determining fund portability was not administrative simplicity.[25] Instead the Commission's stated historic policy has been to promote the dual goals of universal service and market competition. For example, in its Rural Task Force Order, the Commission cited concerns that freezing support in competitive areas could have the unintended consequence of discouraging investment in rural infrastructure and affect competition:

> A number of commenters argue that carriers in competitive study areas will have reduced incentive to invest in infrastructure, because they will be unable to obtain additional support for such investments once their high-cost loop support is frozen. One commenter states that fixing support could interfere with the normal, "cyclical" investment patterns of small rural carriers. In addition, some commenters argue that the Rural Task Force's proposal is over-inclusive and would distort incentives for competitive entry, because support would be frozen regardless of how many subscriber lines a competitive carrier serves within a study area, whether it captures or adds

[24] 47 U.S.C. § 254(b)(5).

[25] *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256* (Rural Task Force Order) FCC 01-157, released May 23, 2001.

lines, or whether it serves only a limited geographic portion of the study area . . . .[26]

Clearly if freezing support to competitors in a market could discourage investment and infrastructure, then ACS-F's proposal to totally eliminate such support for some companies could have an even greater negative effect on investment decisions. The Commission should not take the approach advocated by ACS-F without review and the opportunity for other affected companies to comment.

In its Rural Task Force Order, the Commission recognized that its procedures to provide funding to CETCs in rural areas may require revision.[27] The Commission stated its commitment to closely monitor the impact of competitive entry in rural carrier study areas to ensure that the fund remains specific, predictable, and sufficient.[28] The Commission sought comments on how to improve its CETC funding mechanism to avoid excessive growth in the fund.[29] The ACS-F petition therefore seeks a premature decision on issues the Commission has stated its intent to consider when the record is complete.

**8. If there are problems with the CETC fund portability mechanism, the Commission should investigate its options by referring the matter to the Universal Service Joint Board.**

We agree that the method for developing CETC universal service fund payments could be improved. However it would not be appropriate to grant ACS-F the relief it seeks (i.e., denial of USF funds to CETCs). The Commission should base national

[26]Rural Task Force Order at para. 129.

[27]Rural Task Force Order at paras.123-134.

[28]Rural Task Force Order at para. 131.

[29]Rural Task Force Order at paras. 209-211.

policy on a national record, not allegations made by one carrier seeking to protect its market against competition in one part of the country. To the extent that improvements are necessary to the portability mechanism, those improvements are best developed through the State-Federal Joint Board process.

**Conclusion**

The Regulatory Commission of Alaska did not inappropriately certify use of 2002 funds by not considering UNE costs of CETCs. We deny that we inappropriately set UNE rates. The Commission should not grant ACS-F's request that funding be withheld from CETCs based on UNE costs. The Commission should refer the issue of changes to universal service portability rules to the Universal Service Joint Board for review.

RESPECTFULLY SUBMITTED this 30th day of August, 2002.

/S/
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